Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	**WT Docket No. 17-79**
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	**WC Docket No. 17-84**

COMMENTS OF SPRINT CORPORATION

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June 15, 2017

Executive Summary

Sprint has activated small cell sites across the nation and is in the process of deploying tens of thousands of additional small cells to further densify its network. This massive network densification will deliver jobs to the American economy and vastly improved services to consumers and businesses that depend on mobile communications. Unfortunately, antiquated regulatory and bureaucratic hurdles are slowing the pace of this deployment and diverting millions of dollars away from critical infrastructure investment. Lack of access to right-of-way structures, excessive fees, and untenable processes and delays from local governments for permitting and installing small cells have become a major barrier to investment in the mobile economy.

The historic review process, including tribal historic review, imposes massive costs and delays for little to no benefit. In the 13 years since the current process was established, Sprint has submitted thousands of tribal historic review requests and paid millions of dollars in review fees, but has not experienced a single site where a tribe has identified a potentially affected Historic Property.[1] Other users of the public rights of way—such as electric companies, wireline communications providers, sewer and water authorities, and even Wi-Fi network providers—have no obligation under federal law to conduct historic review for their infrastructure

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[1] The FCC's Nationwide Programmatic Agreement defines Historic Property: "Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register criteria." Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission ("NPA") § II.A.9.

construction. Unless the rules and practices are changed, Sprint could pay tens of millions for reviews for small cell historic reviews rather than spending that money on network upgrades.

Sprint proposes an amendment to the Nationwide Programmatic Agreement to exclude tribal review for small cells in rights of way just as they are already excluded from state historic preservation review. Sprint also proposes confirming the Advisory Council on Historic Preservation's current guidance that fees are not required for initial identification of affected sites but that a small, reasonable fee may be appropriate when a tribe has made a good-faith determination that a project may affect an identified eligible Historic Property. Additionally, the Commission should exempt all collocations from tribal review as experience has shown that there is no adverse impact on tribal Historic Properties from collocations. The Commission should limit the review period to 30 days with a firm deadline. These steps—along with the retention of the opportunity to review macro cell sites outside of rights of way with new ground disturbance and the requirement that carriers stop work and notify tribes when excavation discovers human remains or an undiscovered potential Historic Property—limits the burden on tribes and allows them and carriers to focus their efforts where eligible Historic Properties are more likely to be located.

Similarly, the environmental review process is well-intentioned, but despite the expenditure of significant resources to determine the need to prepare environmental assessments, not a single Sprint antenna or tower project has resulted in the need for an environmental impact statement, let alone remedial or preventative action under the National Environmental Protection Act ("NEPA"). This extensive, unvaried experience shows that antenna construction has minimal environmental effect, particularly for small cells. Sprint proposes simple regulatory relief: The FirstNet network has NEPA exclusions much broader than those granted private carriers when

deploying their networks. Sprint proposes that the FCC's exclusions be modified to match those of FirstNet as micro cells present insignificant environmental effects as shown by the FCC's own review of environmental assessments over the years.

Barriers imposed by local governments also have the effect of preventing mobile carriers from providing service. Lack of access to public rights of way, excessive fees, and long delays prevent carriers from upgrading and densifying their networks. Because demand for network coverage and throughput is ever increasing, these barriers leave areas without adequate coverage for wireless customers. Sprint proposes reforms that guarantee access to public rights of way, imposes meaningful time limits with "deemed granted" remedies, and fee structures that allow municipalities to recover their direct and actual costs of allowing access but disallowing excessive profiteering from wireless carriers.

So long as these costly regulatory procedures described above remain in place, the pace of broadband deployment will be slowed and resources diverted. In some cases these permitting and review fees exceed the costs of the small cell hardware, support structure, installation, backhaul, and power combined. In these comments, Sprint presents real world examples and data from its ongoing network build. The Commission need not rely on hypotheticals and projections; Sprint will show how burdensome regulations and fees are having a direct impact on small cell deployment and urges the FCC to act quickly to remove these barriers.

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COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint") submits these combined Comments in response to the FCC's Notices of Proposed Rulemaking in WT Docket No. 17-79 and WC Docket No. 17-84. The deployment of advanced broadband services, including new advanced 5G mobile services, will boost the economy and provide consumers with new products and services unimaginable today. The deployment of these networks, however, is being slowed by antiquated regulatory structures designed for a different time and technology. Sprint applauds the Federal Communications Commission ("FCC" or "Commission") and Chairman Pai for taking on these issues directly and urges the Commission to act quickly as outlined below.

I. Introduction

In an effort to put the issues being addressed by this proceeding in context, Sprint provides the following narrative which outlines the array of regulatory hurdles and fees a wireless carrier faces when installing a small cell on a new utility pole in an existing public right-of-way. Although hypothetical and not exhaustive of all fact scenarios, the narrative draws from

real-world experiences and attempts to exemplify the complexities faced in deploying mobile networks:

Based upon increasing consumer demand, a Mobile Carrier's network engineers decide on February 1, 2016, that they need to enhance coverage and capacity in Anytown, Illinois, a suburb of Chicago. The engineers consult their databases to determine where customer handsets have attempted to obtain a data connection and have reported low signal strength or more demand than available capacity. The engineers plot several small circles on a map of Anytown where new small cell sites are needed. The remainder of this example examines the burdens of deploying at a single site. This is, of course, only one site out of thousands being deployed across hundreds of different jurisdictions.

The network engineers provide the site location information to the acquisition site development Contractor, which looks at maps and photos and conducts site visits to find a suitable location, which could be collocation on a city light pole, existing electric utility pole, or new pole placed in the right of way. In this case, Contractor contacts Electric Company to inquire about collocation on an existing electric pole. Electric Company tells Contractor that it needs to enter into a pole attachment agreement to allow collocation on the Electric Company utility pole. The Contractor and Electric Utility enter into negotiations for a pole attachment agreement.[2] After 45 days and while a pole attachment agreement is being reviewed, Electric

[2] If the Electric Company is an investor owned utility subject to Section 224 of the Communications Act and the FCC is not reverse preempted by a State that takes jurisdiction over pole attachments, then the FCC rates and attachment process and rules apply. If it is a reverse preemption state then state rules apply if the state has issued rules. But at least one state that has reverse preempted has not established a process for wireless carriers to attach to electric utility

Company replies that the designated pole does not have sufficient space to hold the equipment. In this case, there are no other suitable existing structures in the circle designated by the engineers so the Mobile Carrier and Contractor decide to erect a new pole in the narrow grass strip between a strip mall and the highway. The strip already contains a sewer line and buried telecommunications cables.

Contractor does not have a preexisting right-of-way access agreement with Anytown, so it contacts the planning department to begin negotiations. The planning department states that while it has a process for zoning approval of macro cell sites located on private property, it does not have a process for allowing new poles that support small cells in the right-of-way. The Mobile Carrier cannot proceed until such agreement is developed by the city attorney and can be negotiated and signed. This process continues for six months. Finally Contractor and Anytown reach an agreement on September 13, 2016. Anytown imposes a $2,000 per pole per year access fee as well as an application fee of $1,000 for each pole. The application and access fees are much higher than the direct and actual costs of processing the application and managing the city's right of way, but the Mobile Carrier and Contractor reluctantly agree because the project is already behind schedule and increased demand is causing significant customer dissatisfaction. Installing a pole at this location is the best way to meet consumer demand at the nearby shopping mall and high school.

After the right-of-way access agreement is in place, the Contractor now must prepare and

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poles. *See* Notice Seeking Comments, Public Service Commission of New York, *Petition of CTIA – The Wireless Assoc. for the Commission to Update and Clarify Wireless Pole Attachment Protections*, Case 16-M-0330 (June 30, 2016).

submit an application for this specific site. Anytown schedules a zoning meeting, and Contractor sends a representative to respond to citizen concerns. Under the FCC's shot clock for new wireless support structures, Anytown has 150 days to respond,[3] and finally does so on day 149, granting the application. If Anytown failed to respond within 150 days, the Contractor's only remedy would have been to file a lawsuit in federal court to enforce the FCC's shot clock, which is a time-consuming and expensive process that can take years.

Once Anytown siting approval is obtained and actual construction is now likely, the Contractor will begin the environmental and historic review processes. Because of the expense and time associated with NEPA and NHPA review, those processes are generally not started until the municipality has provided its approvals in case the municipality does not approve the initial location.

Contractor works with an Environmental Consultant that uses the FCC's TCNS system and submits the request on February 9, 2017. A week later, the Environmental Consultant has received requests from 37 tribes seeking to participate in the process. Of those 37 tribes, 28 request fees totaling $18,000 to determine if the project will adversely affect any tribal historic sites. One tribe requests an ethnographic study of the area, and the Environmental Consultant pays a Historic Consultant $500 to prepare the study. (That particular tribe always requests a study regardless of location or its knowledge of any eligible Historic Properties that may be affected.)

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[3] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14020, ¶ 45 (2009) ("2009 Declaratory Ruling"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

The Environmental Consultant pays the fees and provides the ethnographic study, and after 30 days, only 17 tribes have responded. All 17 state they have no interest in the site. The Environmental Consultant sends reminder letters to the other 20 tribes, and after another 10 days, has received responses from another dozen, but eight tribes still have not responded. The Environmental Consultant continues to send reminders to the tribes and receives a final concurrence on day 75 that there are no Historic Properties of interest to any of the tribes.

As always, no tribes have objected to the location but the Environmental Consultant has nevertheless paid $18,000 to the tribes for historic review. One tribe, however, has requested $500 to monitor construction. That tribe has not indicated that the specific site is a Historic Property but nevertheless monitors all wireless antenna construction projects in Illinois. The Environmental Consultant responds to the tribe that the entire area had been previously excavated when the road and sewer line were constructed. The tribe nevertheless insists on monitoring construction, and the carrier agrees to pay the $500 requested rather than incur further delay challenging the request at the FCC.

Simultaneously with the tribal review, the Environmental Consultant also contacts the Illinois State Historic Preservation Officer. Although many utility poles in the right-of-way designated for above ground utility placement are exempt, this one is not because it is not within the size constraints designated in the rules.[4] The existing utility poles in the area are only 35 feet tall, but the zoning board has given approval to build a 60 foot pole. Under the Commission's rules, structures that are less than 20 feet taller than existing utility structures in the vicinity in

[4] 47 C.F.R. § 1.1306.

the right of way are exempt from environmental review, but because this new pole is 25 feet taller, Contractor must complete environmental review under NEPA and state historic review by the SHPO, despite having received local zoning approval for the taller pole.

Contractor prepares an FCC Form 620 and submits it to the Illinois SHPO. Form 620 provides photos of the proposed location and additional information about the proposed installation and the site. After several rounds of communication, the SHPO confirms there will be no adverse effects on any Historic Properties as there are none in the area.

The Environmental Consultant confirms that the site is not in a wilderness area, wilderness preserve, will not affect endangered species, and is not in a wetland.[5] But the Environmental Consultant has determined that the area is in a 100-year floodplain. The local zoning authorities had also noticed the floodplain issue but approved the project by requiring that any support facility be elevated above the 100 year base flood elevation. As all equipment will be mounted near the top of the pole, that requirement is not an obstacle. Nevertheless, under the Commission's rules, the presence of a 100-year floodplain requires the preparation of an Environmental Assessment. The Environmental Consultant charges $1,400 for this document. A public notice is published in the FCC's Daily Digest once a week. Under FCC processes, the filing must remain on public notice for 30 days and the Commission withholds issuing a Finding of No Significant Impact (FONSI) to the environment for at least an additional 15 days. Ordinarily, the Environmental Assessment approval process takes about 60 days from the filing date until approval is granted. It should be noted that the FCC process for 100-year flood plains

[5] 47 C.F.R. § 1.1307(a).

is purely ministerial as the FCC defers entirely to other agencies or their designees. More specifically, approval of the Environmental Assessment because of a 100-year flood plain is always granted by the FCC if the applicant has obtained a local building permit, but the Environmental Assessment is nevertheless required.

Meanwhile, the Contractor has noted that the location is near the municipal airport. Fortunately, the Contractor's review shows that the pole is not subject to lighting and marking restrictions, as the FAA process can add months to the time to complete site approvals.

The new location will require backhaul and electricity, so Contractor works with the local electric company to arrange for electric installation and agrees to a metered rate for electricity to the site. The Mobile Carrier decides to use in-band wireless backhaul to a nearby macrocell location that aggregates signals from various towers and uses wired backhaul to connect to carrier's network, so no excavation for communications cables is required.

Having obtained all the necessary regulatory approvals, Contractor is ready to install the new pole. Contractor submits a road closure permit to the highway department, and a week later Contractor finally arrives on site to install the new pole. The tribal representative is there to observe.

A utility truck with a 14" auger spends ten minutes digging the hole, and the pole is installed. No tribal artifacts are uncovered during excavation. A bucket truck is used to mount the wireless equipment, which consists of a radio unit the size of a shoebox, a round antenna approximately three feet tall and a foot in diameter, and a backhaul antenna the size of a hardcover book. Installation takes just over two hours. Finally, the power company arrives and installs the power connection and an electric meter on the pole.

Over 14 months after the initial need to enhance coverage was identified and with more

than $25,000 dedicated to historic review, environmental review, and local permitting fees, the installation—which took less than half a day—is complete. The $25,000 for regulatory compliance exceeds the cost of the pole, hardware, installation, and electrical connection combined.

II. Background

The Commission has acknowledged the importance of infrastructure reform. All three current Commissioners have spoken of the need to reform infrastructure policies, including the need to preempt state or local regulations that prohibit or have the effect of prohibiting the ability of a wireless carrier to provide service.[6] The Notice of Proposed Rulemaking in the above-

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[6] "[T]he FCC must aggressively use its statutory authority to ensure that local governments don't stand in the way of broadband deployment. In section 253 of the Communications Act, for example, Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service." Remarks of FCC Commissioner Ajit Pai, "A Digital Empowerment Agenda," Sept. 13, 2016, ("Pai Speech") at 7.

Commissioners O'Rielly and Clyburn have made similar statements addressing the urgent need to reform infrastructure siting regulations. Commissioner O'Rielly issued a statement last fall: "The Commission's work on wireless infrastructure does not end here, and I will continue my push to stop any inappropriate practices by those localities and governmental entities preventing wireless technology, especially broadband, from reaching Americans." Statement of Commissioner Michael O'Rielly on the Amendment to the Nationwide Programmatic Agreement to Facilitate Small Cell/DAS Deployment, Aug. 8, 2016. **"**Despite efforts to curb such behavior, industry is still experiencing excessive delays and moratoria when filing siting applications for access to locality rights of way. The record is replete with reports of long pre-application processes before an application can be filed or is deemed complete and applications going through two years or more of review before a decision is actually made. These long, intentional delays are also turning into de facto moratoria, with endless tolling agreements and excuses about insufficient resources or the need for new local laws." Remarks of Michael O'Rielly, FCC Commissioner Before the 2017 Wireless Infrastructure Show, Orlando, FL May 23, 2017

Commissioner Clyburn testified before Congress in March 2016 about the need for wireless carriers to have access to necessary infrastructure, stating: "This vision of the promise of 5G is

captioned dockets and the Public Notice in the Mobilitie Declaratory Ruling docket are important first steps in achieving this reform.[7] The FCC is now positioned to accelerate the deployment of mobile broadband services to American consumers.

A. Data Usage is Exploding

Data use by wireless users continues to explode. Industry data shows that mobile data use increased by 63 percent last year worldwide, and 18-fold over the last five years.[8] Cisco estimates that mobile traffic will increase seven-fold over the next five years.[9] The installation of small cells to complement macro sites and to provide customers with more capacity to post, Tweet, stream, and download is the most effective means of addressing this demand. The Super Bowl represents an excellent example of this increase. Sprint customers used more than five terabytes of data inside and directly around NRG Stadium in 2017. Total data usage on the Sprint network increased more than three times compared to the 2016 Super Bowl and about eight

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clear, but to get there, we need to ensure that commercial wireless companies have adequate spectrum and the necessary infrastructure, such as site antenna towers and base stations, to deploy that spectrum." Testimony of Commissioner Mignon L. Clyburn Before the United States House Of Representatives Committee on Energy & Commerce Subcommittee on Communications & Technology "Oversight of the Federal Communications Commission" March 22, 2016. In a separate address, Commissioner Clyburn emphasized the need for infrastructure deployment to be at the "lowest cost and quickest pace." Keynote Remarks of Commissioner Mignon L. Clyburn, #Solutions2020 Policy Forum, Oct. 19, 2016.

[7] Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, Public Notice, WT Docket No. 16-421 ("Mobilitie Public Notice").

[8] http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.pdf, at 1.

[9] *Id.* at 5.

times that of the 2015 Super Bowl. Sprint deployed 23 small cells around NRG Stadium in Houston in anticipation of this growth in demand.

B. The Only Solution to Exploding Growth in Data Demand is Densification

Carriers can add capacity by adding spectrum or by building additional antenna locations so that the same frequencies can be used by multiple sites to provide services to additional users. The infill of small cells to reuse the same frequency bands more often and in smaller areas is called densification. Although small cells do increase coverage, their main purpose is to increase overall capacity while using the same amount of spectrum. The FCC recently observed that "deploying ten small cells in a coverage area that could be served by a single macrocell could result in a tenfold increase in capacity while using the same quantity of spectrum."[10]

Given the rapid growth in customer demand for increased speed and capacity and the fact that this growth cannot be met solely through macro cells, Sprint and other carriers must expeditiously densify their networks in the next few years, both to augment their existing 4G networks and to prepare for the deployment of 5G. Sprint has begun a massive deployment of small cells to meet rising consumer demand. These cells are usually located on new and existing utility poles and other structures in the public rights of way such as traffic signals and streetlights.

C. Three-Legged Stool

The Commission's reform efforts on infrastructure siting must address all three barriers that wireless carriers face when dealing with state and local government permitting authorities:

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[10] Mobilitie Public Notice at 4.

1) access to public rights of way to place new poles and attach to existing structures; 2) reasonable fees for both applications and usage of the rights of way from both local governments and tribes that demand payment for historic review; and 3) timely action on access agreements and individual site permits, as well as prompt action by tribes that require historic review. Without removal of all three barriers, rapid, economical infrastructure deployment is threatened.

Many of these regulations and fees were created when carriers were deploying voice-centric networks that entailed establishing large macro cells that cost hundreds of thousands of dollars, and carriers could more readily justify waiting through the process, litigating adverse decisions, and, if required, paying fees that were a much smaller share of the total cost of each site. The new infrastructure is radically different, however, and the old siting paradigm no longer applies. The cost per cell has dropped to the low tens of thousands of dollars and the number of sites needed has multiplied. Most importantly, the physical size and visual effect of deploying a small cell is dramatically less than traditional towers. In this environment, carriers cannot engage in a protracted regulatory struggle for each individual site. Given that all carriers face limited capital budgets, they are forced to limit the number and pace of their deployment investments to areas where the delays and impediments are the least onerous, to the detriment of their customers and, ultimately and ironically, to the very jurisdictions that imposed obstacles in the first place.

D. Small Cell Technology Primer

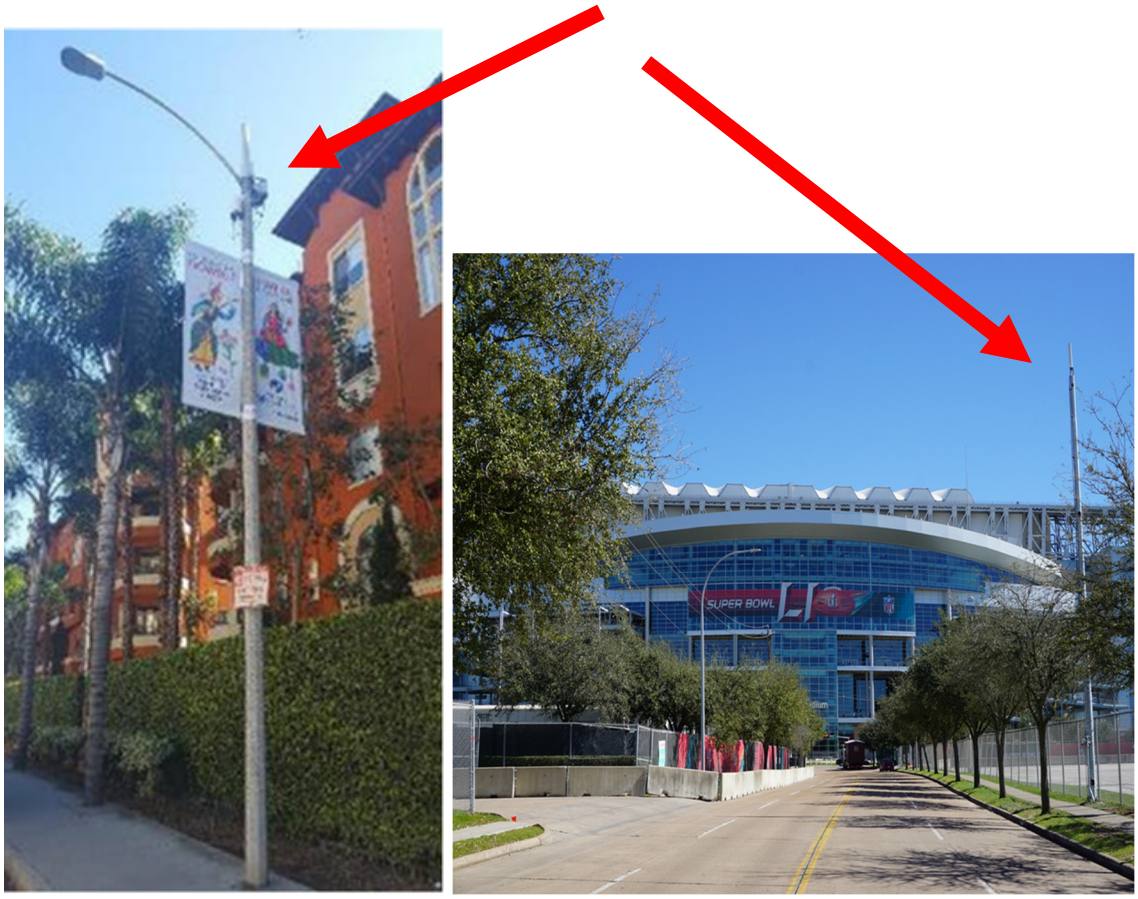
Small cells are wireless base stations that have the same basic functionality as the familiar macro cells, but are much smaller physically and cover smaller geographic areas. They cover a radius of approximately ¼ mile or less, compared to the multi-mile radius of traditional macro cells. A traditional macro site consists of a tall support tower with numerous separate antennas mounted on top. The ground area is often fenced and contains one or more equipment

cabinets.

In contrast, Sprint's small cells are small, prepackaged units approximately the size of a shoe box to a fire extinguisher that mount on a traditional utility pole, streetlight, traffic signal, or building with no additional equipment installed on the ground. Although FCC rules define a small cell as a pole-mounted antenna of no more than six cubic feet and other equipment no more than 21 cubic feet for a single installation,[11] in practice, Sprint's small cells are much smaller. A typical small cell radio unit used by Sprint is approximately 20"x10"x10", or in other words smaller than the ubiquitous power transformers mounted on electric poles nationwide and similar in size to pole-mounted junction boxes for telecommunications. There is an omni-directional antenna and one or two additional smaller pieces of equipment mounted on the pole to provide backhaul, as well as an electric meter.

Pictured below are two typical small cells, one mounted on a streetlight and the other on a new steel utility pole outside NRG Stadium in Houston, Texas (indicated by the red arrow):

[11] 47 C.F.R. § 1.1307(a)(4). Amended Collocation Agreement § VI.5.b.ii.



III. The Current Burdensome and Ineffective Tribal Historic Review Process Can and Must Be Rationalized

A. Overview

While there are many costs facing carriers during deployment, the costs imposed on carriers from fee demands in the Section 106 Process for tribal historic review under the National Historic Preservation Act have risen precipitously over the last few years. Sprint supports the efforts of the federal government and the FCC to preserve sites of religious, historic, and cultural significance to Indian tribes. Unfortunately, good intentions to protect important sites have given way to a spiraling imposition of fees at sites with essentially no chance of having an adverse impact on a site that meets the criteria under the FCC's Nationwide Programmatic Agreement of eligibility for inclusion on the National Register of Historic Places.

The FCC's rules under the NHPA were born at a time when mobile carriers were building tall towers in previously undisturbed soils. Now, carriers are installing small poles, primarily in already disturbed rights of way or collocating on existing structures. Many are along roads and highways in soil that has been graded and regraded to build those highways, sewers, storm drains, and to bury gas lines, electrical lines, and communications conduit. Under the Commission's questionable definition of "federal undertaking," electric and wireline telecommunications providers do not pay the tribes to assess the impact of their deployment of utility poles, but wireless carriers are directed to do so—even if they use the exact same type of pole with the exact same ground disturbance. A carrier can deploy a Wi-Fi transmitter on a new pole without invoking the tribal historic review process, but if that same pole is used for licensed mobile broadband or voice services, the FCC takes the position that tribal review is required.[12]

The fees imposed on carriers for tribal consultation are becoming prohibitive and are unnecessarily diverting capital from deployment. Sprint's costs per site have increased almost 17-fold in the last six years, from $439 per site in 2011 to more than $7,713 today:

[12] *See* NPA § II.A.1 (defining "Antenna" to include only those "operating … pursuant to Commission authorization" and defining "Tower" to be "structure[s] built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas").

Average Tribal Review Fees Per Site[13]

2011 $439
2012 $691
2013 $920
2014 $1,863
2015 $2,413
2016 $4,068
2017 $7,713

The FCC imposes no limits on the amount of fees tribes can demand nor on the geographic areas over which they can assert the right to be consulted under FCC rules. Tribes have every incentive to increase their fees and expand their areas of review, and many have done so. Some tribes are now requiring as much as $1,650 to conduct a historical review. Given the lack of constraints, a carrier like Sprint that is planning on deploying tens of thousands of sites at an average of $7,713 per site is looking at a total cost of potentially hundreds of millions of dollars for tribal historic consultation—all of which could go to network deployment rather than a bureaucratic process that is beyond the scope of Section 106 and rarely if ever succeeds in not only avoiding an adverse impact to an eligible Historic Property but even identifying a site for consideration of potential impacts.

The Super Bowl again provides an excellent example of the resources being drained from broadband deployment. Sprint recently deployed an array of small cells in Houston to upgrade its network in preparation for the crowds descending on Super Bowl LI. Sprint paid $7,535 in tribal historic review fees[14] for each site, with most tribes requesting a fee without even a cursory

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[13] Based on data from an environmental consultants for projects for Sprint since 2011. 2016 data is through early 2016. 2017 data includes projects in 4Q16 through present.

[14] The $7,535 includes Sprint's consultant's charge of $685 for processing the tribal fee review and fee requests. The amount paid directly to tribes was $6,850 per site.

investigation to assess whether the sites were eligible for listing on the National Register of Historic Places. The stadium construction itself did not involve any historical consultation with tribes under Section 106 as stadium construction is not a federal undertaking, but carriers building an antenna in the parking lot are obligated by FCC rules to engage in the Section 106 process. One tribe requesting fees for a new pole in the NRG Stadium parking lot (pictured on page 14 of these comments) has its historical roots ranging from Montana to Oklahoma, but Sprint can find nothing to show that this tribe has any connection to the Houston area sufficient to justify its demand for consultation fees in this situation. In the absence of a Commission directive, Commission staff have indicated in working groups that they are reluctant to second guess a tribe's designation of its historical areas that it wants to review.

These costs and regulatory burdens might be justified if they were effective at protecting tribal heritage. But they are not. Since the current tribal consultation system was enacted by the FCC in 2004, Sprint has not had a single substantive consultation with tribes over adverse impacts on Historic Properties despite thousands of tower and antenna project notifications to tribes using the FCC's Tower Construction Notification System and paying millions of dollars in "consultation" fees. PTA-FLA filed a petition for declaratory ruling with the FCC in 2016 in which it noted that it "or its affiliates have sent out thousands of notices through the TCNS system over the years and have never received a single indication that any Indian burial ground or other sacred place was implicated."[15] Crown Castle, the nation's largest provider of wireless infrastructure, stated that "Crown Castle has never received any negative commentary from any

[15] Petition for Declaratory Ruling, PTA-FLA, Inc., at 6 (May 3, 2016).

tribe throughout its history of TCNS filings."[16]

Wireless antenna and tower construction is an infinitesimal fraction of the total ground disturbed across America to build houses, roads, shopping centers, office buildings, factories, stadiums, sewers, and the countless other aspects of modern life. But of those building projects listed in the previous sentence, only wireless carriers receive payment demands from tribal nations to assess the impact of the construction on historic and religious sites, as the other types of construction are not considered federal undertakings and therefore are not generally subject to Section 106 review.

Carriers and their infrastructure partners face an unjustifiable additional burden when constructing small cells. Federal law only requires historic review under Section 106 when the construction is considered a "federal undertaking." A sewer authority could completely excavate a utility corridor to install a 5-foot diameter sewer line without being obligated to conduct a historic review process. An electric utility could install a 40- foot tall utility pole without historic review. Even a wireline telecommunication provider can install that same pole without historic review. Sprint could even install a 40-foot tall utility pole in the right of way to provide Wi-Fi service using unlicensed spectrum without conducing a historic review or notifying interested tribes. But the FCC has, in practice, subjected that that exact same pole to would require a costly and time consuming historic review if installed to support a wireless antenna used to provide broadband or voice service using licensed spectrum.

These rules make no sense. The potential risk to historic properties does not depend on

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[16] Comments of Crown Castle, WT Docket No. 15-180, at 3 (Sept. 28, 2015).

whether wires or an antenna are hung from the pole, nor does the risk depend on whether the spectrum is licensed or unlicensed. The Commission's rules make such a distinction, and it's a costly one.

B. Legal Background on Tribal Historic Review Process

The requirement for FCC wireless license holders to consult with tribal representatives when constructing towers or installing antennas on existing structures arises from the National Historical Preservation Act of 1966 and the Nationwide Programmatic Agreement ("NPA") that the FCC, state historic preservation officers, and tribal representatives executed in 2004 pursuant to the NHPA.[17] The NPA partially replaces the rules promulgated by the Advisory Council on Historic Preservation ("ACHP") so long as the rules are consistent with the ACHP's regulations.[18]

The NHPA requires the federal government to take into account the effects of federal undertakings on historic properties.[19] This is commonly called the Section 106 process due to the section numbering in the original legislation. The FCC has determined that due to the federal registration, licensing, and environmental approval process, construction of wireless communications towers is a federal undertaking.[20] Accordingly, even private parties building poles or towers are required to undergo the Section 106 process as their actions are deemed to be

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[17] *See* 20 FCC Rcd 1073 (2004).

[18] 36 C.F.R. § 800.14.

[19] 16 U.S.C. § 470f.

[20] Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 20 F.C.C. R. 1703 (2004), upheld by D.C. Circuit in *CTIA v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

a federal undertaking if they intend to install antennas that use spectrum subject to FCC wireless licenses.

The FCC tribal review process applies to new antenna construction located anywhere in the nation, not just on tribal lands or Indian reservations. For small cells, Sprint and other carriers are focusing deployments at locations in rights of way. The NPA exempted poles in a utility right of way from certain aspects of the historic review process by state historic preservation offices, but specifically did not extend the exemption to the tribal review process.[21] Additionally, the 2014 Small Cell Order excluded poles in utility rights of way from some environmental review regulations under NEPA but specifically retained Section 106 requirements.[22] (The 2014 Small Cell Order extended some Section 106 exclusions but did not extend those exclusions to new poles in rights of way.)[23]

The NHPA rules do not apply for the construction of utility poles used to carry electricity or wireline communications, even if it is the same size and type of pole commonly used for small cell installations. Neither the FCC nor other federal government agencies consider construction of this type to be a federal undertaking. Similarly, a pole installed for a Wi-Fi network is not subject to NHPA while the same pole for a small cell using licensed spectrum is subject to the NHPA and the tribal review process.[24]

C. Current Situation

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[21] NPA § III.

[22] Small Cell Order fn. 163.

[23] Small Cell Order ¶ 19.

[24] NPA II.A.1; 2014 Order ¶ 91 & fn. 248.

1. Fees

There are no constraints on the amount of fees any individual tribe can demand nor on the geographic areas for which a Tribe may demand consultation. As a result, the total amount of fees per small cell location have increased dramatically in recent years. A review of fee demands as of February 2017 shows that at least one tribe has raised its review fees to $1,650 per project, another tribe charges $1,500, another tribe is at $1,200, and six additional tribes have fees of $1000.

The total fees per site have increased dramatically in recent years. Sprint's records show that in 2011, the average total fees per site were $439 and the average fee demand per tribe was just over $250. In 2012, the average site received payment requests from just under two tribes, while in 2016, the number of tribes reviewing each site was more than 10. The average charge per tribe more than doubled over that time period, from $254.44 in 2011 to $513.01 in 2016. Recent trends show that the increase is continuing, with an average of more than $7,700 for recent projects from late 2016 to early 2017. Data from an environmental consultant working for Sprint reported a range of fee demands by state, from a low of $642 per site in Washington state to $10,708 in Illinois. The lowest fees were reported in the Pacific Coast states and the mid-Atlantic, with the highest fees prevailing in the Midwest and Great Plains.

The tribal fee demands in the Chicago area may be the highest in the country. A recent project for a tower company building a new tower resulted in 37 tribes requesting participation, 29 of which requested fees ranging from $125 to a high of $2,100 for a tribe that requests payment for a site visit for each new site involving excavation. Total costs for this site would exceed $18,000. Sprint's records show that fees for new macro antenna collocations on modern buildings in urban Chicago are generating fee demands in the range of $11,000 to $12,000 even

though there are already antennas on those buildings and the projects do not disturb any ground.

2. Delays

The tribal historic review process also causes delays. The NPA states that "30 days" for a tribe to respond is a "reasonable opportunity". Unfortunately, the NPA does not create a specific timetable or provide a mechanism to enforce a 30 day time limit and provides no procedure to address when a tribe does not respond to repeated inquiries.

The Commission issued a Declaratory Ruling in 2005 that addresses a small subset of nonresponding tribes.[25] That ruling addresses tribes that provide no response to a TCNS submission, but does not address situations where a tribe has requested money or information through an automated response to a TCNS submission or has otherwise participated in the identification process but then fails to confirm that the project will have no adverse effects. The NPRM makes note of a "Good Faith Protocol" but does not cite the protocol.

The details of the Good Faith Protocol were released to interested parties just last week at the FCC's Annual Tower Construction Workshop. In describing the new process, Commission staff first outlined the process established in the 2005 Declaratory Ruling that applies to non-responsive tribes, but stated that "[t]his process [is] not available when Tribal Nation initially requests information or fees, applicant provides, and then no timely response."[26] In short, this process is not available for tribes that request fees for review.

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[25] *See* Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement, Declaratory Ruling, 20 FCC Rcd 16092 (2005).

[26] Communications Protocols: The Good Faith Process, Jill Springer, Deputy Federal Preservation Officer, FCC (June 7, 2017).

Staff then described a new "Good Faith Process" to "address[] cases where Tribal Nation does not timely respond after expressing specific interest and receiving requested materials." The vast majority of tribes using TCNS request fees but do not express "specific interest" but rather have a blanket pre-set response requesting fees to review all proposed sites anywhere within their pre-designated areas of interest. Staff stated that the new Good Faith Process only applies where a "Tribal Nation has initially responded with an express of interest more specific than a pre-set TCNS reply, but consequently ceased communications."

While providing some guidance, these two processes leave a large gap. The cause of most of industry's current delays lies with tribes that "initially request[] information or fees" such that the 2005 process does not apply but have not made an "express[ion] of interest more specific than a pre-set TCNS reply" on a particular site but rather have only demanded fees for all sites within its geographic designations.

The vast majority of TCNS delays that Sprint has seen in recent years involve a TCNS submission where Sprint pays the fees required by the tribes, but then never receives confirmation that the tribe has no interest. Again, this situation fits in neither scenario described above. The 2005 Declaratory Ruling does not apply because the tribe has requested fees, and the new Good Faith Process does not apply because the tribe never expressed "interest more specific than a pre-set TCNS reply."

Staff also suggested new requirements that are not contained in current rules. Specifically, staff requests that a Form 620 be submitted for new poles in utility rights of way to escalate projects where a tribe has not responded. In general, the NPA requires a Form 620—also known as a Submission Packet—for SHPO review. But as stated above in these comments, poles in rights of way are exempt from SHPO review under Section III.E of the NPA and no Form 620

is required under the NPA for tribal review unless a tribe identifies an eligible Historic Property and seeks consultation under Section VII of the NPA.

The proposed Good Faith Process, however, would require submission of a Form 620 for any escalation of non-responsiveness by a tribe that has not responded after requesting fees. Such a requirement would be inconsistent with Commission rules and the NPA. The Submission Packet is provided to tribes pursuant to Section VII, but only when they are a "consulting party" and they do not become a consulting party until they identify an affected Historic Property. And no Form 620 is submitted to the SHPO because poles in a utility right of way are exempt as stated above. If the proposed Good Faith Process were implemented, carriers building in a utility right of way would have a new "rule" that requires a Form 620 even when no tribe identifies an affected eligible Historic Property.

The Good Faith Process would also require a minimum of 60 days before proceeding. This would result in unnecessary delay and is inconsistent with the current NPA guidance that provides 30 days as a reasonable period for a tribe to respond to a TCNS submission under Section IV.F.4.

The delays caused by the tribal review process are a Gordian knot for carriers. Because the rules do not provide a timetable and the tribes have no incentive to cooperate after receiving payment and because the Commission does not have a transparent process adopted through notice and comment rulemaking, there are no clear legal standards stating what the Commission, applying federal law, requires in these situations.

3. Overbroad Geographic Designations

Many tribes have historic territories that differ from their current residence or location of their reservation. Many tribes were forcibly relocated to different areas, and many tribes also had

travels or wars that occurred outside their historic homelands. Many tribes therefore have burial grounds or other sacred places outside their current habitation and that may not be identified on any publicly available maps. Accordingly, a tribe may justifiably have interests in lands outside their current location.

Sprint is hesitant to second guess the geographic designations made by tribes given the tribes' superior knowledge of their own history, but in the absence of FCC constraints, there are instances of geographic designations that are not self-evident. For example, a tribe with roots in northern Wisconsin has recently demanded review fees for antenna installations on existing structures in Long Island, New York. Another tribe whose own website describes its origins as the middle Ohio Valley with no mention of Florida required $550 to consult on a new small cell in Ft. Myers, Florida, in the narrow strip between the highway and a parking lot.

A tribe with roots in Montana that was forcibly relocated to Oklahoma and had some links to

northern Texas required payment for review of antenna placements in Houston.

There is no procedural mechanism to authenticate these geographic designation claims and neither the FCC nor other tribes challenge the geographic designations for which a tribe expresses interest and demands payment. Without any rigor imposed upon the process, tribes have incentives to claim wider swaths of territory to be of interest for which they can collect a fee. Even if a tribe knows of a handful of eligible Historic Sites in a given state, FCC rules should not require payment for the infinitesimal chance that an antenna would impact those known sites.[27]

Even if a tribe has knowledge of one or even several sites in a state or county that it believes are eligible for the National Register, it is patently unreasonable for that tribe to charge $500 for every single antenna construction in that territory for the infinitesimal chance that the new pole will impact the site—particularly in a situation like that pictured above, where the photographs show evidence of underground storm drains and other buried utilities in the narrow median between highway and parking lot—let alone the construction of the highway itself—that have undoubtedly already disturbed any archaeological artifacts that may have been there.

4. Tribal Requests for Ethnographic Studies and Site Monitoring

Some Tribal Nations routinely request cultural or ethnographic studies to be prepared by the Applicant for their use in reviewing a proposed antenna location. These studies cost hundreds of dollars to prepare. The Commission should modify the NPA to preclude these requests as they

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[27] For example, the state of Florida is 65,755 square miles. As defined in the NPA, the area of direct effects is the area of ground disturbance. NPA § VI.C.2. Accordingly, there is a one in 733 million chance that a new pole installation would have a direct adverse effect on a 50-by-50 foot eligible Historic Property.

undermine the premise of tribal consultation in the first place—specifically, that the tribes have better knowledge of their history and archaeological sites than do outside groups.

5. The NPA's purpose is to protect only sites eligible for listing on the National Register.

Current FCC practices have lost sight of the scope of sites that are protected under Section 106 as interpreted by the FCC. The rules, on their face, do not protect all sites that contain buried artifacts. The NPA only applies to Historic Properties. The FCC's definition of "Historic Property" includes "[a]ny prehistoric or historic district site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. … The term includes properties of traditional religious and cultural importance to an Indian tribe … that meet the National Register criteria."[28]

The standard of eligibility for inclusion on the National Register is vague.[29] The mere presence of Indian artifacts or burials does not indicate that the site is eligible for inclusion on

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[28] NPA § II.A.9.

[29] *National Register criteria for evaluation.* The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 60.4.

the National Register. (Note that the historic review process is distinct from the obligation to notify tribes if human remains are discovered. In that circumstance, the installer is obligated to stop work, notify the affected THPO, and adhere to federal and state laws regarding the treatment of human or burial remains.[30])

The National Park Service administers the National Register of Historic Places for the federal government. One aspect that the National Park Service considers in evaluation of a proposed Historic Property is integrity. If a potential Historic Property is already compromised by virtue of being in a disturbed right of way, it is questionable whether such a site could ever be considered eligible for listing on the National Register of Historic Places.

6. Current Process Diverges from Statute and Rules

The Commission's rules create a two-step process for carriers to work with interested tribes. First, all tribes are invited to identify any eligible Historic Property that may be affected by the tower or antenna installation.[31] If a tribe identifies such a Historic Property, it may request consultation to mitigate the impact on the Historic Place, either by relocation or by modification of the proposed installation.[32] The vast majority of the fees requested by the tribes are for the identification phase of the process.

It is exceedingly rare for a tribe to engage in substantive consultations. As noted above, since the advent of TCNS, despite thousands of TCNS filings, not a single tribe has engaged with

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[30] NPA § 9.D.

[31] NPA § IV.

[32] NPA § VII.

Sprint over potential adverse effects to a Historic property. PTA-FLA and Crown Castle report similar outcomes.[33]

The NPA identifies two types of effects of a cell tower on a Historic Property: direct and indirect. The NPA defines direct effects as "the area of potential ground disturbance and any property, or any portion thereof that will be physically altered or destroyed by the Undertaking." For small cells, this is typically a hole approximately 14 to 24 inches in diameter and 5 to 8 feet deep in which a utility pole is inserted. Under the NPA, there is no direct adverse effect even if an archaeological site is just a feet away from the excavation. The area for visual effects is a ½ mile radius for towers of less than 200 feet. It is unlikely that an antenna installation on a utility pole or building would ever have an adverse indirect affect as the standard under the NPA is to define adverse indirect effect as the "introduc[tion of] visual elements that diminish or alter the setting, including the landscape, where the setting is a character-defining feature of a Historic Property that makes it eligible for listing on the National Register." NPA § VI.C.3. Given that Sprint is building small cells in above ground rights of way and on existing structures, it is difficult to fathom how the addition of a small cell to the visual landscape would diminish the eligible characteristics beyond that already caused by the support structure itself, let alone other structures in the area.

As the Commission noted in the NPRM, nothing in the FCC's rules requires applicants to pay identification or consultation fees requested by tribes.[34] The ACHP similarly does not have a rule requiring fee payment, but has expressed the opinion that the fees are not required. The first

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[33] See footnotes 15 and 16, *supra*.

[34] NPRM ¶¶ 42-49.

ACHP publication on fees was a 2001 Memorandum from the executive director:

> While ACHP's regulations encourage the active participation of Indian tribes, they do not obligate Federal agencies or applicants to pay for consultation. If an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward.[35]

The ACHP issued a similar statement in a 2008 handbook[36] and again in 2012.[37]

Despite the lack of any legal obligation to pay fees for identification, Sprint has been repeatedly cautioned that it was inadvisable to refuse to pay identification fees to the tribes. While Sprint has continued paying the fees in accordance with this advice, Sprint and others can no longer justify paying fees to place utility poles in disturbed rights of way. Carriers have limited budgets, and every dollar that goes to pay unjustified review fees is a dollar that cannot be spent on equipment to improve service capacity and coverage for their customers.

A further concern is that the FCC's rules and processes allow a tribe to charge multiple fees for the same site, even to the same carrier, at different times. The FCC's NPA contemplates an exemption for previously reviewed sites,[38] but the FCC has not put a system into place to implement that exclusion. Sprint paid $2,700 in tribal review fees in 2014 to install three antennas while simultaneously removing six obsolete antennas on the rooftop of a modern

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[35] http://www.achp.gov/regs-fees.html, Memorandum, Executive Director to Federal Preservation Officers, Tribal Historic Preservation Officers, State Historic Preservation Officers, Indian Tribes, Fees in the Section 106 Review Process, July 6, 2001.

[36] Consultation With Indian Tribes in the Section 106 Review Process: A Handbook, Nov. 2008, p. 12.

[37] Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, at 13 (2012).

[38] NPA § III.F.

building in an urban location in Georgia. Sprint then paid $6,100 in tribal review fees two years later to install three new antennas on the same rooftop. No excavation occurred in either circumstance, and, of course, no potentially affected Historic Properties were identified either time.

D. Sprint Supports Federal Government Efforts to Protect Tribal Nations' Cultural Heritage, But it Must Be Done Rationally

Sprint supports the Commission's efforts to protect Historic Properties, both tribal and non-tribal. Sprint recognizes that tribal archaeological sites have been damaged in the past by antenna construction, and Sprint seeks to avoid those harms in the future. But, at the same time, the Commission must acknowledge that the costs imposed dramatically outweigh any purported benefits since the current process is ineffective in its goal of protecting historic properties.

Antenna construction is an infinitesimal share of all ground disturbance in this country in comparison to agriculture, housing construction, shopping malls, roads, electrical transmission towers, stadiums, parking lots, etc., none of which require historical or tribal review except for the tiny fraction that are considered federal undertakings. If the government's purpose is to create reasonable regulations that best protect tribal history, the current system is an abject failure as we look at the pinprick footprints of poles to support antennas while ignoring almost all other ground disturbing activities across the nation. If the goal of the process is to protect tribal heritage, we should focus our resources and attention on areas that are most likely to contain buried cultural resources.

Tribal representatives have indicated that buried artifacts have been found in utility rights-of-way. While Sprint has no reason to doubt those assertions, it has not been shown that these locations were known *ex ante*, nor that the current review process would have discovered

them before excavation. Instead, it seems that they were discovered by the installation crews paying careful attention while excavating and stopping work if and when artifacts or human remains were encountered.

Sprint recognizes that some tribes may be overwhelmed by the sheer volume of antenna construction that will happen in the next few years. That burden could be reduced by smart exclusion policies that exempt facilities with remote possibilities of harm to historic properties so that carriers and tribes can focus their attention on the types of projects that have a higher probability of encountering buried artifacts or destroying a culturally significant viewshed. If carriers can avoid the review process for rights of way that have already been disturbed and have been designated for disturbance as rights of way, and also avoid review for antenna installations on buildings and support structures that have already infringed on whatever historic views may have once existed, all interested parties can focus on larger-scale excavations and on new structures in areas that do not already contain modern structures.

Another development in the 13 years since the advent of TCNS is the availability of online aerial photo and mapping tools. In general, Sprint submits its TCNS notifications with coordinates with approximately 10 feet of precision. It is literally a one-minute process to enter those coordinates into Google Earth and obtain an aerial photo and, in most cases, street-level views of the site. This ability was not present when the current process was created more than a dozen years ago. This technological advancement makes review much simpler and quicker for the vast majority of sites than it was in the past.

E. Sprint's Proposal

Sprint's process for rule reform is simple and accomplishes two goals: protecting eligible Tribal historic properties while at the same time eliminating unnecessary costs and streamlining

timetables for wireless deployment.

- Exempt small cells in any public or utility rights of way from tribal review. The NPA already exempts these sites from SHPO review. Given that all other users of the public rights of way—whether sewer, water, gas, electric, wireline telecom, or Wi-Fi wireless—can deploy in the public rights of way without Section 106 consultation, there is no justifiable reason to impose additional obstacles solely on wireless carriers using licensed spectrum.[39] After all, there are already tens of millions of utility poles in these rights-of-way, while wireless carriers plan to install a tiny fraction of that number. The Commission should encourage deployments in rights of way as decades of planning have designated these areas to be disturbed for infrastructure to lessen the burden on remaining areas that are not in the rights of way.
- Prohibit tribal review charges for the identification process under Section IV of

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[39] The Commission's assertion that construction of utility poles in utility rights of way constitutes a federal undertaking is dubious at best, as CTIA asserted in its challenge. *CTIA v. FCC*, 466 F.3d 105 (D.C. Cir. 2006). The classification as a federal undertaking is further undermined—perhaps fatally—here as both grounds that the Commission relied on are absent. In the TCNS Order, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 20 F.C.C.R. 1073, 1075 ¶ 2, 2004 WL 2248768 (2004) (the "NPA Order "), the FCC claimed that antenna construction was a federal undertaking because it required FAA approval and because environmental assessments were required. Almost all utility poles do not require FAA approval unless they are particularly tall and in close proximity to an airport. And the Commission has already exempted small cells in utility rights of way from NEPA unless historic review obligations are triggered. This logic is entirely circular—the only element of the rules that requires Commission approval is an environmental review that is only required if there is a historic property. Absent the presence of a Historic Property, no environmental assessment is required and therefore no Commission approval is needed to build such a tower. Accordingly, it is no longer a federal undertaking even under the Commission's twisted logic in the TCNS Order.

the NPA, while allowing reasonable charges up to $500 per tribe under Section VII for those tribes that have identified a specific eligible Historic Property that could be directly affected by the pole or tower installation.

- Exempt tribal review for all collocations, including Twilight Towers. The incremental impact of an additional antenna is unlikely to cause any direct or indirect harm to tribal Historic Properties. Even if minor excavation is required for power or backhaul, it makes no sense to only require historic review when that trench is used for an antenna used for licensed spectrum but not when power or telecommunications cables are installed for all other purposes. As to visual effects, Sprint has never had a tribe claim an adverse indirect visual effect for a collocation despite paying millions of dollars in review fees.
- Exempt replacement poles from review. In some situations, Sprint replaces an existing streetlight with a new streetlight that has built-in small-cell equipment. These replacement poles typically are installed in the same location as the previous pole. Although the vast majority would be exempt under Sprint's proposed right-of-way exemption outlined above, the Commission should clarify that a replacement pole in the same location is also exempt even if not in a public right of way, such as a parking lot.
- Retain obligations to notify the Commission and affected tribes under Section IX if a previously unidentified site that may be a Historic Property is discovered during construction. And of course the obligation to follow federal and state law would remain when construction results in the discovery of human burials. This protects tribal sites even when the tribes have no previous knowledge of the site

and the surface features do not reveal what lies beneath.

- Prohibit tribes from requesting cultural or ethnographic studies from applicants. While this is not a widespread issue, certain tribes have a practice of requesting cultural or ethnographic reports for every TCNS request, including collocations in urban areas. These request undermine the rationale for tribal historic review in the first place—specifically that the tribes know their own histories better than do non-tribal groups or even other tribes.
- Limit routine on-site monitoring. Some tribes routinely request payment for tribal representatives to monitor construction. Such requests should be limited to sites where the tribe has identified an eligible Historic Property and has participated in consultation under Section VII of the NPA.
- Limit review period to 30 days after the tribe receives notification through TCNS, after which an applicant may proceed without further action from the tribe or Commission. The tribes are sovereign nations, but the current system purports to require burdensome follow-up letters, reminders, and escalation as many tribes do not respond promptly. Unless a tribe seeks an extension for good cause as to a specific site, tribes that do not respond waive their right to object or consult under Section VII. Of course, if any artifacts or burials are discovered during excavation, the carrier must follow the procedures under Section IX of the NPA.

IV. NEPA Rules Impose Unnecessary Burdens on Wireless Antenna Deployment

Sprint supports strong environmental protections and works diligently to minimize the

effects of our business on the environment.[40] Sprint carefully considers the effects on the environment in planning its network deployment and seeks to deploy infrastructure in a way that minimizes any negative environmental effects.

The National Environmental Protection Act has been interpreted by the FCC to require all new sites outside rights of way and new sites more than 20 feet or 10 percent taller than existing structures within a right of way to screen for environmental effects under Section 1.1307 of the Commission's rules. This screen costs approximately $2,000 per site.

Over the last several decades, Sprint estimates that it has done preliminary NEPA checklists for thousands of sites at a cost of tens of millions of dollars. Of those sites, approximately 250 potentially implicated one of the criteria in Section 1.1307, thereby necessitating the preparation of an environmental assessment that costs approximately $1,300. Most of those environmental assessments were for historic preservation concerns by state historic preservation officers under Section 1.1307(a)(4) because the site was in or near a Historic District or Historic Property. Every single one of those Environmental Assessments resulted in a finding of no significant impact, or FONSI. Accordingly, Sprint has never been required by NEPA rules to prepare an environmental impact statement for antenna construction.

The Commission's NEPA rules have required Sprint to spend tens of millions of dollars to investigate a minimal likelihood of harm. Again, Sprint supports strong environmental protections and takes appropriate steps to ensure that its deployments do not adversely affect the environment, but the Commission's rules impose huge costs on network deployment with little to

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[40] http://goodworks.sprint.com/planet/

nothing in the way of corresponding benefits.

The Commission is currently working with NTIA to deploy FirstNet, an emergency communications system that will operate with similar technology that wireless providers currently use for mobile voice and data. This deployment is undoubtedly a federal undertaking. The federal government has created a categorical exclusion from NEPA for FirstNet for any individual site involving less than five acres of ground disturbance and towers of less than 199 feet tall.[41] It would be appropriate for the Commission to extend the same exclusion for private carriers deploying broadband services.

V. The Commission Has an Obligation to Preempt Local Barriers That Have the Effect of Preventing Carriers From Providing Service

A. Congress Has Already Made Clear that the Obligation and Authority to Act to Accelerate Infrastructure Deployment

The Congressional mandate to the FCC to remove barriers to infrastructure investment is unequivocal. Section 706(a) of the Telecommunications Act requires the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "other regulating methods that remove barriers to infrastructure investment."[42]

Congress specifically authorized preemption to accomplish this goal. The Commission has an obligation under 47 U.S.C. § 253(a) and (d) to preempt any "State or local statute or

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[41] National Telecommunications and Information Administration First Responder Network Authority [Docket Number: 131219999–4337–02] RIN 0660–XC009 National Environmental Policy Act Implementing Procedures and Categorical Exclusions, 79 Fed. Reg 23945, 79 Fed. Reg. 23950 (April 29, 2014) (granting categorical exclusion for "[c]onstruction of wireless telecommunications facilities involving on more than five acres (2 hectares) of physical disturbance at any single site").

[42] Codified at 47 U.S.C. § 1302(a).

regulation, or other State or local legal requirement [that has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 253(c) requires the compensation for the use of the public rights-of-way to be "fair and reasonable" as well as "competitively neutral and nondiscriminatory," and "publicly disclosed." Failure to meet these standards is a violation of Section 253(a), which requires preemption under Section 253(d).

Additionally, Section 332(c)(7) imposes specific obligations on local governments when reviewing applications to place infrastructure. That section requires state and local land-use authorities to act on requests for authority to "place, construct, or modify personal wireless service facilities within a reasonable period of time" after such requests are filed. Moreover, it prevents local governments from regulating the placement, construction and modification of wireless facilities in a manner that discriminates among providers of functionally equivalent services or prohibits or has the effect of prohibiting the provision of personal wireless services.[43]

Finally, Section 6409(a) establishes that State and local governments "may not deny, and shall approve," any "request for a modification of an existing wireless tower or base station that does not substantially change the [facility's] physical dimensions."[44]

B. Specific Deployment Hurdles and Barriers That Wireless Carriers Face

To facilitate deployment of small cells, the Commission must address all three barriers imposed by local governments: access to rights of way, excessive fees, and long delays. Sprint provided extensive comments in WT Docket No. 16-421 about fees and incorporates those comments here. The section below addresses access to public rights-of-way and delays caused by

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[43] 47 U.S.C. § 332(c)(7)(B).

[44] 47 U.S.C. §1455(a).

state and local governments.

1. Access to Rights of Way

Section 253 of the Communications Act is clear: state and local government have an obligation to refrain from imposing barriers that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Access to public rights of way is critical for the provision of any wireless service. Not only are the rights of way, by definition, along the roads and public spaces where mobile customers live, work, travel, and congregate and therefore most frequently use mobile services, they are the obvious location for siting wireless infrastructure for many practical reasons. One such reason is that public right-of-way corridors often already have the three essential inputs necessary to install a wireless antenna: electricity, backhaul communications, and a siting location. The public rights of way typically have other poles and utility structures, such as traffic signals, streetlights, utility poles, traffic cameras, and overhead signs that are ideal spots for unobtrusively placing small-cell equipment.

Some cities have restricted access in numerous ways, from outright prohibitions, to temporary bans while they "study" the "problem," to regulatory hoops not required of legacy incumbent wireline providers. The Commission has an obligation under Sections 253(a) and 332(c)(7)(B) to preempt such obstacles when they have the effect of prohibiting wireless carriers from providing service or when discriminating among carriers.

2. Total Exclusions

Some municipalities have imposed total bans on the deployment of new poles for the siting of wireless small cells. While they allow new cells to go on existing support structures or buildings, they prohibit the installation of a new pole for a small cell—even in situations where

no existing structure meets the needs of the carrier to provide service.

Such prohibitions impose real burdens on wireless carriers, and can effectively prohibit service. The Circuit Courts of Appeals have reached different conclusions when interpreting this provision of Sections 253 and 332. Some circuits have "imposed a 'heavy burden' of proof to establish a lack of alternative feasible sites, requiring the applicant to show 'not just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try.'"[45] Other circuits have taken a less restrictive approach, requiring that an "applicant must show only that its proposed facilities are the 'least intrusive means' for filling a coverage gap in light of the aesthetic or other values that the local authority seeks to serve."[46] The Commission asks if it should attempt to resolve the differences between the circuits on whether land use denials prohibit or have the effect of prohibiting personal wireless service.

From Sprint's perspective, neither is the appropriate standard as both miss the mark. An outright ban on certain deployment locations has the effect of prohibiting service in many areas where use of the rights of way is the only way to provide service. To densify 4G networks today and in the 5G era to come, carriers will need tens of thousands of new locations to deploy the necessary capacity. Wireless carriers can no longer provide coverage maps, participate in extensive zoning hearings, and pay third-party consultants to produce a study about whether a small cell should be placed in one of ten potential locations in a locality. The reality is carriers

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[45] Mobilitie Public Notice at 9-10 (listing cases).

[46] *Id. at* 10 (listing cases).

will need small cells installed on right-of-way light poles or utility poles near most or all of those locations. Carriers are not attempting to fill a "coverage gap"; rather, the issue is filling capacity gaps. The old legal tests and coverage gaps simply no longer apply in a capacity-driven wireless world. Instead, the Commission should find that bans on the use of right-of-way structures categorically "prohibits or has the effect of prohibiting" personal wireless services. In the new world of placement of network assets for capacity densification, a Commission ruling redefining prohibition of service is necessary such that small cells must be permitted in right-of-way locations.

Some localities do not even have a process in place to accept and review applications. This is a direct violation of Section 253's prohibition against actions that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Such a refusal to accept applications also constitutes a violation of Section 332(c)(7)(B)(ii), which forbids regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services."

The purpose of the public rights of way is to provide infrastructure that is in the public interest and infrastructure that the public wants and needs. No party challenges the premise that wireless capacity must be increased to meet the needs of the public. Use of the *public* rights of way to meet these needs is completely consistent with purpose of the rights of way. If actual or predicted traffic volumes exceed the capacity of city streets, the public rights of way are used to accommodate the expanding traffic volumes. The same considerations must apply to communications infrastructure as well. The addition of a pole or the attachment of a 20"x10"x10" small cell box to an existing pole to meet the exponential growth in broadband need is an insignificant impact on the right of way.

3. Moratoria

The Commission has stated that moratoria on infrastructure deployment by local governments are "presumptively unreasonable" if they result in delays of more than 150 days for new sites or 90 days for collocations.[47] Additionally, moratoria do not affect the running of the shot clock.[48] The Commission found that these shot clock timeframes also apply to the siting of small cells.[49] The Commission asks again for evidence of moratoria and the impact on deployment that they have.[50]

There are two types of moratoria that interfere with small cell deployment. The first is a refusal to consider the use of the public rights-of-way and vertical structures in the rights of way for small cell deployment. The second is a refusal to act on permit applications for use of right-of-way structures for small cell deployment. The Commission's shot clock order addressed the second issue, but did not directly address the first type of moratorium that is currently a larger barrier to deployment. Some municipalities stop short of an outright refusal to allow access to the public rights of way, but have dragged their feet for such a long time in establishing a process that their actions have imposed a de facto moratorium on the use of the rights of way.

Despite the presumptive ban on moratoria, they continue. One southern city, for example, has imposed a moratorium on new builds in the downtown area until it revises its standards for fees, designs, and deployment in underserved areas. This moratorium has continued for 18

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[47] 2014 Infrastructure Order ¶ 267.

[48] *Id.* ¶ 266.

[49] *Id.* ¶¶ 270-272.

[50] NPRM ¶ 22.

months. In such a circumstance, the Commission's shot clock rules are wholly ineffective because that city has continued to discuss small cell siting but has not implemented a uniform policy and process under which actual applications can be submitted. The alternative for a carrier wanting to deploy there is to drop out of negotiations and sue the city in federal court to enforce the shot clock rules. Litigation in federal court, however, directly undermines the ability of carriers to engage in negotiation of a reasonable policy.

In July 2016, a state department of transportation adopted a regulation that flatly prohibited new poles, towers, and monopoles in the rights of way controlled by the state DOT. The industry became aware of the regulation only after it had been adopted. Subsequently, members of the industry entered into discussions with the state DOT, and as of this writing, the parties are hopeful that the state DOT will ultimately adopt a compromise regulation that allows for the construction of new wireless infrastructure in rights-of-way controlled by the DOT.

The Commission should strengthen its ban on moratoria by clarifying that if a local government is not accepting applications, whether for use of the public rights of way or merely to obtain permits to place sites on municipally owned poles or other structures, the shot clock nevertheless begins to run when the applicant submits the basic information about the proposed site, including proof of delivery, that is consistent with other jurisdictions that are accepting applications or previous submissions prior to the moratorium. Furthermore, as discussed elsewhere in these comments, a deemed granted remedy must be available to enforce the Commission's ban on moratoriums, whether official or de facto. Absent a strong remedy, the judicial process merely constitutes an extension of the moratorium, and if there is not even a process in place for the submission of applications to use the public rights of way, there is no way for a court to validate the rationale—or lack thereof—underlying a municipality's decision

on an application.

4. Discrimination

Local governments have also discriminated against some carriers in contravention of Section 253. One eastern city has an exclusive contract with one infrastructure provider that prohibits the city from approving installation of new poles from other carriers or infrastructure providers, as well as attachments to city-owned infrastructure. Other carriers are limited to attaching to existing infrastructure owned by third-parties. The Commission must clarify that terms and access made available to any telecommunications provider, whether telephone, cable, or wireless, must be available to all and, at a minimum, on the same terms. Anything short of this is a direct violation of the nondiscriminatory requirements of Section 253(c).

5. Siting Requirements that Question Network Design

Another problematic action by local governments is the imposition of siting requirements that question a carrier's network design. Such actions violate Section 253 because any local government action that prevents a technology upgrade has the effect of prohibiting the provision of service.

Different technological standards and spectrum allocations require different antenna locations, heights, and spacing for different carriers. What worked for 2G may not work for 3G, 4G or 5G. What works for 800 MHz may not work at 2.5 GHz, and what works at 2.5 GHz may not work at the higher frequencies the Commission approved for mobile broadband use last year. If a carrier's antenna locations are frozen based on earlier network architectures, it cannot effectively provide service as technology changes.

Section 6409 is unhelpful in this circumstance. While it allows for antenna or equipment upgrades at a particular location where there already are wireless facilities, it does not make it

easier for carriers to install new wireless facilities, to relocate or reposition antennas to meet revised spectrum and radio needs, or to move cells to new locations based on the carrier's own evaluation of its network needs.

Carriers plan their networks based on balancing the costs of installing or upgrading their facilities against the benefits of increasing coverage and capacity in certain areas at the expense of other areas. This type of economic evaluation is no different than what all businesses do. However, unlike all other businesses, some local governments insist on making wireless carriers justify their ordinary business decisions. The jurisdictions mentioned above, for whatever reason, apparently think Sprint would go to the trouble and expense of building new network architecture to provide increased coverage or capacity where it is not needed. Carriers have no incentive to place facilities where they are not needed, and the Commission should not countenance efforts by local government to impose requirements that substitute the government bureaucrat's opinion for the carrier's engineers.

C. Excessive Delays

Some municipalities are causing excessive delays to small cell deployment. These delays happen in two ways. Some cities will not consider any siting applications until there is a master agreement with the city. The other type of delay is the post-application delay by violating the shot clock timelines.

Sprint and Mobilitie have tabulated the delays they have observed in reaching master agreements with jurisdictions across the United States. Mobilitie has sought access agreements in hundreds of jurisdictions. Of those as of March 2017, 343 have taken more than six months to reach agreement. Of those 343 jurisdictions, 75 have taken more than a year, 11 have taken more than 18 months, and two have taken more than two years. Some of the delay is certainly caused

by negotiations over the rates the jurisdiction may charge, but it is not fair to attribute the delay to an applicant when the applicant is merely insisting on the "fair and reasonable" rates required by Section 253.

VI. Sprint's Proposed Solution to Excessive Infrastructure Fees, Delays, and Inability to Access Public Rights of Way

Sprint has been working with other industry members to present legislative proposals to state legislatures across the country that attempt to make the small cell siting process more uniform, consistent and cost efficient. The Commission should issue a declaratory ruling clarifying that these legislative proposals are correct interpretations of the requirements of Section 253(a) and (c). The Commission also should adopt a revised timetable pursuant to the same authority it used to implement the shot clock under Section 332 and the deemed granted requirement under Section 6409.

A. Nationwide Standards Under 332

Sprint has worked with other industry members to press for a uniform system that creates a fair process that protects local government authority and public input over infrastructure siting, while streamlining the process so that carriers and infrastructure companies can deploy quickly when and where their customers are demanding additional capacity and faster data speeds.

Several states have already enacted legislation that is working, and the FCC should endorse the approach taken by these states. In 2016, Ohio and Kansas passed legislation that streamlines and makes uniform the local permitting process for small cells and limits the fees that can be assessed for permit applications and right of way usage.[51] In 2017, Virginia passed a

[51] 49 Ohio Rev. Code § 4939.01 et seq., available at: http://codes.ohio.gov/orc/4939; Kansas

similar bill that establishes a statewide, uniform, streamlined small cell siting process and limits application, right of way usage fees and attachment fees.[52] Seven other states have passed legislation in 2017 to streamline the small-cell deployment process: Arizona, Colorado, Florida, Indiana, Iowa, Minnesota, and Texas. These laws appropriately and effectively address each aspect of the three-legged stool at issue in this proceeding—access, fee levels, and time frames. Their provisions should guide the Commission in its interpretation of the requirements of Sections 253 and 332(c).

The Commission should also detail reasonable timelines that give local governments a fair opportunity to review applications but do not overly burden carriers with excessive delays that prevent them from responding to the needs of their customers. Carriers have proposed a 60-day clock for collocation applications to reflect the miniscule impact that collocated small cells have on the surrounding area and the presumption that carriers should be able to deploy such cells quickly and with a minimum of regulatory red tape. The 2009 timelines were based on older macro-cell deployments and processes being performed at a time with less experience with wireless infrastructure deployment than today. Small cells are generally less obtrusive, and local governments are more familiar with how to manage the rights-of-way for wireless communications. Accordingly, timeframes can be shortened while still allowing for reasonable consideration by the municipalities.

Carriers have proposed a 60-day shot clock with a "deemed granted" remedy: "An

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Statute 66-2019, available at http://www.kslegislature.org/li_2016/b2015_16/measures/hb2131

[52] Virginia S.B. 1282, available at https://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+SB1282

Application shall be processed on a nondiscriminatory basis and deemed approved if the Authority fails to approve or deny the Application within 60 days."[53] A shot clock without a "deemed granted" provision at the end is of minimal value as enforcement is difficult and a costly burden for the industry, the judicial system, and on the citizens of the offending cities. Unfortunately, some municipal authorities can and do ignore the deadlines without repercussions. Chairman Pai has stated that the shot clock rules in 332(c)(7) need "teeth."[54] Sprint agrees with the Chairman's proposal that inaction by government on an application constitutes "deemed granted" acceptance of the application: "[I]f a local government does not act on a wireless facilities application by the end of the FCC's shot clock, that application would be considered approved and an ISP could start building right away."[55]

Sprint has already detailed above why the Commission has the authority to implement fee caps and shot clocks with deemed granted remedies to implement Congress' mandate to the Commission in Sections 253 and 332 to facilitate the rapid deployment of mobile services.

Sprint has advocated and will continue to advocate for states to implement effective legislation. Nevertheless, Sprint thinks that federal action is needed for several reasons. Nationwide uniformity is an immense benefit given the need for wireless carriers to provide nationwide coverage in thousands of jurisdictions. Overlapping and contradictory legal

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[53] Florida, Indiana, Kansas, Texas and Virginia all have passed small cell legislation that requires small cell application attachments to be acted upon in 60 days or the application is deemed granted.

[54] Pai Speech at 2.

[55] Remarks of FCC Commissioner Ajit Pai at the CTIA Wireless Foundation Smart Cities Expo, Nov. 2, 2016, at 7.

requirements increase costs with little corresponding benefit. It would be consistent with FCC treatment of other pro-competitive decisions stemming from the passage of the Telecom Act to decide this issue at the national level as opposed to allowing thousands of municipalities to decide on their own. The FCC appropriately reasoned in the First Report and Order that national rules would reduce costs and provide uniformity across jurisdictions.[56] Congress has required the Commission to remove barriers, and this is best accomplished through a consistent nationwide process rather than piecemeal action.

Additionally, a national framework provides direction and clarity to state and local government authorities responsible for managing public rights of way. Many authorities are spending a long period of time and significant resources in an effort to establish new policies and practices for small-cell siting. A nationwide policy will eliminate the need to endlessly debate the major topics that are encountered in each locality.

VII. Changes to Pole Attachment Rules Will Promote Broadband Deployment

In the *Wireline Infrastructure NPRM*,[57] the Commission has asked for comment on changes to pole attachment rules that would facilitate broadband infrastructure deployment. Sprint agrees that rule changes that ensure access to utility poles—in particular, poles owned by municipalities and municipally owned utilities—at cost-based rates and just and reasonable terms and conditions, will promote broadband infrastructure deployment.

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[56] Local Competition Order ¶¶ 216, 308 and 309.

[57] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment,* released April 21, 2017 ("*Wireline Infrastructure NPRM*").

The Commission has noted that "pole attachments are a key input for many broadband deployment projects."[58] This is certainly true for network densification projects. As described above, Sprint, is in the midst of deploying tens of thousands of small cells in order to add capacity in high-traffic areas and to improve service in hard-to-reach locations and indoor sites. Lack of access to utility poles at cost-based rates and within reasonable timeframes increases the cost and time to implement broadband projects such as Sprint's massive small cell deployment. As Sprint has explained above, this lack of reasonable access remains a problem, and Commission action to correct this situation is both wholly warranted and within the Commission's purview under Sections 253(a) and 332(c) of the Act.

The Commission should actively endorse model legislation regarding the attachment of small wireless facilities to poles owned by municipalities and municipally owned utilities. Such model legislation would include the following principles:

- The municipality or municipally owned utility may not enter into an exclusive arrangement with any party for the right to attach to its poles;
- The rates, terms and conditions for collocations on poles owned by a municipality or municipally owned utility shall be nondiscriminatory regardless of the services provided by the collocating party;
- The rate to collocate on the utility pole may not exceed the annual recurring rate that would be permitted under 47 U.S.C. § 224(e), or a specified cap per pole, whichever

[58] Wireline Infrastructure NPRM ¶ 3.

is less. The rate shall recover no more than the actual, direct and reasonable costs related to the applicant's use of space on the pole;

- All rates to collocate on the utility pole must be nondiscriminatory, competitively neutral, and commercially reasonable.

Additionally, the Commission should adopt its proposal to codify a rule that "excludes capital costs that utilities already recover via make-ready fees from pole attachment rates."[59] Such a rule would promote the public interest by preventing over-recovery of costs and helping to ensure just and reasonable rates. Historically, the Commission's rate making efforts have focused on ensuring that rates are just and reasonable. For example, under traditional cost-of-service regulation, the regulated entity is allowed to recover its costs of providing a given service, including a rate of return on its capital, and taxes. Under the total element long run incremental cost (TELRIC) model used to calculate interconnection and collocation rates, the incumbent LEC is allowed to recover forward looking (rather than historical) incremental costs associated with the network element or service, assuming efficient and economical equipment and technology. Neither of these rate making methodologies allows double (or more) recovery of costs, and indeed, certain of the FCC's rules specifically prohibit double-recovery of costs.[60] The Commission should implement a similar policy here, and adopt its proposal to codify a rule

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[59] Wireline Infrastructure NPRM ¶ 38.

[60] *See, e.g.*, 47 C.F.R. § 51.917(d)(1)(vii), which provides that "[i]f a Rate-of-Return Carrier recovers any costs or revenues that are already being recovered as Eligible Recovery through Access Recovery Charges or the Connect America Fund from another source, that carrier's ability to recover reduced switched access revenue from Access Recovery Charges or the Connect America Fund shall be reduced to the extent it receives duplicative recovery."

excluding already-recovered capital costs from pole attachment rates.

VIII. Copper Retirement and Discontinuance Notifications

The Commission has proposed revisions to its Part 51 network change notification rules "to allow providers greater flexibility in the copper retirement process and to reduce associated regulatory burdens."[61] Specifically, the Commission proposes to repeal the copper retirement notice requirements adopted in 2015, which require incumbent LECs to wait to implement a planned copper retirement for 180 days from release of a public notice, and to provide direct notice of the retirement to ILEC customers and other interested parties.[62]

In the *2015 Technology Transitions Order*, the Commission emphasized the importance of both promoting "market-driven technological transitions and innovations" and preserving the core statutory values of "competition, consumer protection, universal service, and public safety."[63] This balancing of sometimes competing goals remains relevant today. Of particular concern to Sprint here is the potential competitive impact of premature or abrupt copper retirements.

Although the industry is moving towards more fiber and IP-based networks, there are service providers who continue to rely in part upon copper facilities provided by incumbent LECs. Retiring these wholesale input facilities, particularly without adequate notice, could be very disruptive. To the extent that the service provider customer is a competitor of the LEC (or of an affiliate of the LEC) that is providing the copper facility, retiring copper facilities where

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[61] Wireline Infrastructure NPRM ¶ 56.

[62] *Id.* ¶ 57.

[63] *Technology Transitions, et al.*, 30 FCC Rcd 9372, ¶ 1 (2015).

there are no reasonably priced alternative facilities available, or without allowing a reasonable transition period, could have serious anti-competitive implications. As the Commission previously emphasized, "a carrier should not discontinue a service used as wholesale inputs until it is able to determine that there will be no discontinuance, reduction, or impairment of service to a community or part of a community of end users…or until it has obtained Commission approval pursuant to section 214(a)."[64]

Ethernet over copper is a case in point. Sprint uses Ethernet over copper last-mile access to provide wireline service to some enterprise customers, particularly in areas where fiber is not available or not economic (*e.g.,* because the customer doesn't need a high-bandwidth fiber connection/is not close to a fiber connection, or the fiber is available only at unreasonable rates, terms and conditions). If a LEC were to abruptly retire this copper-based service without offering an acceptable alternative facility, Sprint's ability to provide service to its customers could be compromised. Adequate notice to ensure a seamless transition to other facilities is essential and "will allow interconnecting entities to work more closely with their customers to ensure minimal disruption to service as a result of any planned copper retirements."[65] Absent record evidence that the current notification period (180 days from release of a public notice) imposes an unreasonable hardship, the Commission should retain the current rule.

The availability of reasonably priced alternatives to Ethernet over copper is not assured, particularly given the deregulation of business data services (BDS) provided by incumbent

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[64] 2015 Technology Transitions Order ¶ 114.

[65] 2015 Technology Transitions Order ¶ 17.

LECs.[66] Sprint remains unconvinced that market forces are sufficient to restrain unreasonable pricing by incumbent LECs, who continue to control an overwhelming share of the BDS market in most areas of the nation. Under these circumstances, eliminating or sharply curtailing copper retirement notifications is very problematic.

IX. Conclusion

Sprint requests that the Commission fulfill its statutory mandate to encourage broadband deployment by requiring state and local governments to charge no more than their direct and actual costs and act on applications within a reasonable period of time pursuant to Sections 253 and 332(c) of the Act. To do so, the Commission should:

- Amend the NPA to exempt poles in public rights of way from tribal historic review. Limit fees for review to $500 but only for consultation after a tribe has identified an eligible Historic Property that may be adversely affected by the proposed installation. Declare that a failure of a tribe to respond within 30 days to a TCNS submission is a waiver of its right to consult.
- Extend the categorical exclusion under NEPA to match the ground disturbance and height parameters set for FirstNet.
- Declare that mobile carriers and infrastructure companies have the right to access public rights-of-way under Section 253(a) as contrary rules or regulations have

[66] The Commission recently overhauled the rules governing price cap LECs' provision of BDS (*see Business Data Services in an Internet Protocol Environment,* WC Docket No. 16-143 *et al*., Report and Order released April 28, 2017), and rate-of-return carriers have filed a petition for rulemaking to obtain similar de-regulatory treatment (*see* Petition for Rulemaking filed by ITTA and US Telecom on May 25, 2017 (WC Docket No. 17-144)).

the effect of prohibiting the provision of service and are therefore preempted by Section 253(d).

- Declare that a "reasonable period of time" under Section 332(c) to act on small cells or DAS applications, as defined by the Commission in the 2014 Infrastructure Order, is 60 days for collocations. A failure to act within the time period results in a "deemed granted" approval of the application.
- For jurisdictions without a process in place for small cell or DAS applications, the shot clock nevertheless begins to run when the applicant submits the basic information about the proposed site that meets the minimum standards as established by the Commission.
- Finally, the Commission should reiterate the requirements under Section 253 that jurisdictions cannot discriminate among carriers or types of carriers and that contracts and pricing terms must be publicly disclosed.

For the reasons articulated above, the Commission must act quickly to address the unnecessary costs and delays that governments impose on carriers actively deploying small cells. Sprint is building now, and every day that goes by that Sprint is subject to unreasonable fees by state and local governments means that fewer small cells will be built and fewer Americans will enjoy the benefits of faster mobile broadband speeds.

Respectfully submitted,

SPRINT CORPORATION

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June 15, 2017